

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ALVIN R. SIMMONS <i>and</i>)	
JOSEPH M. SIMMONS)	
Plaintiffs,)	Civil Action No. 21-1139
)	
v.)	Judge Cathy Bissoon
)	
CRAIG STREET BEER CO.,)	
)	
Defendants)	

ORDER DISMISSING CASE

On August 27, 2021, Alvin Simmons and Joseph M. Simmons (“Plaintiffs”) filed a Motion for Leave to Proceed in Forma Pauperis, (Doc. 1), along with a complaint (Doc. 1-1). Plaintiff’s Motion was granted and his Complaint filed on September 2 (“Complaint,” Doc. 4).

After granting the right to proceed *in forma pauperis*, a court must review the plaintiff’s allegations and dismiss his or her lawsuit if: (a) the allegation of poverty is untrue; (b) the action is frivolous; (c) the complaint fails to state a claim; or (d) the action seeks money damages from an immune defendant. 28 U.S.C. § 1915(e)(2); Atamian v. Burns, 236 F. App’x 753, 755 (3d Cir. 2007) (“[T]he provisions of § 1915(e) apply to all *in forma pauperis* complaints.”). In performing this review, the court construes a *pro se* plaintiff’s complaint liberally in favor of him or her. Haines v. Kerner, 404 U.S. 519, 520–21 (1972).

Turning to Plaintiffs’ Complaint, filed as a *pro se* form complaint for violation of civil rights from the clerk’s office, Plaintiffs appear to be alleging that the employees at Craig Street Beer Co. assaulted Mr. Joseph Simmons on the basis of his sexual orientation and race. Complaint at 4-5. In order to survive dismissal for failure to state a claim, Plaintiff’s complaint must contain “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). However, while Plaintiffs have

selected the box indicating that Defendant was a state actor (Complaint at 3), they do not provide any facts supporting such an allegation—a necessary component to any allegation under 42 U.S.C. § 1983.

Plaintiffs do not allege that Defendants acted in concert with the state or that their actions were controlled by the state. *See Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009) (noting that the “principle question at stake” in determining whether state action occurred “is whether there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself”). There are no allegations asserted that could draw such a connection between Defendant’s action and the state. As such, Plaintiffs have failed to state a claim because Defendant is not a state actor. *See Moore v. Coyne*, 728 Fed. Appx. 81, 82 (3d Cir. 2018) (affirming the district court’s dismissal without leave to amend in a case where “[n]one of the conduct alleged in the complaint can be fairly attributed to the state for purposes of §1983” where defendants were private attorneys). Further, the Court notes that all allegations appear to be injuries sustained by Mr. Joseph M. Simmons, and it does not appear that Mr. Alvin R. Simmons has any standing to bring such claims, regardless of jurisdiction.

For the reasons set forth above, Plaintiffs’ Complaint (Doc. 4) is **DISMISSED WITH PREJUDICE**¹ pursuant to 28 U.S.C. § 1915(e)(2) and Fed. R. Civ. P. 8., as Plaintiffs have failed to state a claim for relief.

¹ Not only have Plaintiffs failed to demonstrate that Defendant is a state actor, they also failed to allege any actual violation of federal rights. See Fed. R. Civ. P. 8(a) (requiring “short and plain statement[s]” showing that the pleader is entitled to relief) and 8(d)(1) (“Each allegation must be simple, concise, and direct.”). Plaintiffs do not provide any facts that would support a claim that the alleged assault on Mr. Joseph Simmons was based on his sexual orientation, or even any details on the assault, aside from listing witnesses. Complaint at 4. As such, amendment would be futile.

IT IS SO ORDERED.

September 9, 2021

s/Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via First-Class U.S. Mail):

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